IN THE

Supreme Court Of The United States

OCTOBER TERM, 1977

NO. 77-506

JOHN H. PETERS ..... *Petitioner*

v.

STATE OF ARKANSAS ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI
TO THE ARKANSAS SUPREME COURT

JURISDICTIONAL STATEMENT

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The Petitioner, John H. Peters, petitions this Court for a Writ of Certiorari to review the final order and Opinion of the Supreme Court of Arkansas entered July 5, 1977, affirming the Judgment of his conviction for the offense of False Pretense and submits this statement to show that the United States Supreme Court has jurisdiction of this Petition and that a substantial question is presented.

OPINION BELOW

The Opinion of the Supreme Court of Arkansas is not reported as it was not designated for publication under the provisions of Revised Supreme Court Rule 21. The Opinion is set forth in Appendix "A" to the Jurisdictional Statement.

JURISDICTION

The Opinion of the Supreme Court of Arkansas was delivered on July 5, 1977, affirming the Judgment of the Sebastian County Circuit Court sentencing Petitioner to three (3) years in the Department of Corrections on the offense of False Pretense. Notice of Appeal was filed in the Supreme Court of Arkansas on July 19, 1977. A Motion to Stay the Mandate of the Arkansas Supreme Court and to Remain on Bond was filed in the Arkansas Supreme Court on July 19, 1977, and on the same date the Arkansas Supreme Court entered an order granting Petitioner's Motion to Stay Mandate and to Remain on Bond pending appeal to the United States Supreme Court or pending Petition for Writ of Certiorari. (On September 22, 1977, a Notice of Filing for Writ of Certiorari to Review was filed in the Arkansas Supreme Court)

The jurisdiction of the United States Supreme Court to review this decision by appeal or Petition for Writ of Certiorari is conferred by 28 U.S.C. §1257.

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitutional Provisions involved are Amendments 6 and 14 and can be found in U.S.C.A., Constitution, Amendment 6 to 14, page 223.

Amendment 6 provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *

Amendment 14 provides as follows:

> * * * No State shall make or enforce any law which shall abridge the privilege of immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTION PRESENTED

1. Was Petitioner denied due process of law and a fair and impartial trial when the trial court and the Supreme Court of Arkansas permitted highly prejudicial questions to be asked Petitioner and his witness, Shirley Self, on cross examination under the guise of testing their credibility as witnesses, which questions were highly inflammatory?

STATEMENT

On January 2, 1975, Petitioner was charged by Information with the offense of False Pretense in that he, on September 11, 1974, did unlawfully, feloniously, and with intent to defraud by certain false and fraudulent written and oral pretense and representations obtain telephone service from the Lavaca Telephone Company of more than $35.00 in value.

Petitioner entered a plea of not guilty and trial was held on March 9-10, 1976. The testimony of the State revealed that Petitioner owed $3,369.43 for his July Telephone bill and that a lady on September 12, 1974, brought in a check of the amount allegedly signed by Petitioner. The check was subsequently dishonored by the Citizens Bank

of Lavaca, Arkansas, and the telephone bill has not been paid to date.

The State, over Petitioner's objection, introduced testimony that the Bank of Lavaca returned several checks drawn on the account of Petitioner because there were insufficient funds in the account. No testimony was offered by the State that these checks were fraudulent.

The trial court also permitted testimony that Petitioner failed to appear on June 9, 1975, for his trial, that his bond was forfeited, a warrant for his arrest issued, and that he was arrested in Arizona and returned to Arkansas for trial. Petitioner's bondsman was also permitted to testify that a bond-jumping charge had been filed against Petitioner. This testimony was permitted over Petitioner's motions, objections and motion for a mistrial.

When the State rested its case, Petitioner moved for a directed verdict alleging that the evidence was insufficient to submit the issue of False Pretense to the jury. This motion was overruled.

Petitioner testified in his own behalf and called other witnesses, including Shirley Self, his former secretary. The State cross-examined Petitioner and Miss Self extensively, allegedly to test their creditability as witnesses over several objections and motions by Petitioner which were overruled.

The jury returned a verdict finding Petitioner guilty of the offense of False Pretense and fixed his punishment at three (3) years. Judgment was entered on the verdict of the jury sentencing Petitioner to three (3) years in the Department of Corrections.

Petitioner appealed the Judgment to the Arkansas Supreme Court. On July 5, 1977, that Court delivered its

Opinion affirming the Judgment of the Sebastian County Circuit Court.

Petitioner petitions this Court for a Writ of Certiorari to review the final Judgment of the Arkansas Supreme Court.

ARGUMENT

Petitioner believes that the question presented herein is substantial and requires plenary consideration and warrants briefs on the merits and oral argument for resolution of the question. The reason the question is substantial is set out below.

The Opinion of the Supreme Court of Arkansas affirming the holding of the trial court that these questions were proper permitted the jury to consider improper, prejudicial, and highly inflammatory questions and answers (even if the accusation in the question was denied) and may have resulted in the jury basing its verdict on passion, prejudice, conjecture and speculation.

Petitioner was a witness in his own behalf and he called Shirley Self as a witness to corroborate his testimony concerning the transaction in question. Both witnesses were cross-examined extensively by the State. A great majority of the questions were so-called credibility questions and had nothing to do with the transaction in question. We submit that the trial court and the Supreme Court in permitting these so-called credibility questions prejudiced Petitioner and denied him due process and a fair and impartial trial.

Petitioner was cross-examined for 89 pages in the record from pages 265 to 357. No more than three pages

were devoted to questioning Mr. Peters about the check which was the basis of the false pretense charge. Shirley Self was cross-examined for 14 pages in the record from pages 369 to 383. Not more than one page was devoted to questioning her about the check transaction. All the rest of the cross-examination of both witnesses was devoted to so-called testing of credibility questions.

Petitioner was questioned over his objection about his sex life, whether he was living with one of his secretaries and what women he slept with. (R. 267-268) Mr. Peters was questioned about the debts he owed. (R. 272) He was questioned about his Federal income tax return. (R. 285) He was questioned about possession of a stolen truck in Arizona. (R. 287-288) He was asked if he did not make the statement he would get even with the man who turned him in. (R. 289-291) He was questioned over his objection about checks to Mr. McWilliams and Doc Hendricks. (R. 295-296) He was questioned about assignment of debts concerning a Heflin-Hooten account. (R. 298-300) He was questioned over his objection about other so-called worthless checks. (R. 301) He was asked over his objection if he was not setting up a legal defense by telling Mr. Gibson the check was no good. (R. 315) He was asked over his objection about his bond with Ralph Middleton. (R. 318) He was asked over his objection if he did not burn down his trailer and its records. (R. 324-327) He was asked over his objection about mortgaging some cattle that were already mortgaged. (R. 331-335) He was asked if he did not enter into negotiations or enter a conspiracy with Ronnie Osmond to buy a stolen truck. (R. 335-357)

Shirley Self was questioned over Petitioner's objections about drinking in the trailer with Petitioner where she worked and being confronted by the City Marshal of Lavaca

about it. (R. 371) She was questioned over Petitioner's objection about her sex life and who she was sleeping with the night Petitioner's trailer burned. (R. 372-373) She was questioned over Petitioner's objection about going over the jury list with her uncle. (R. 381-383)

These questions were not asked for any legitimate purpose except to prejudice the jury against Petitioner and his witness. Some questions may be pertinent to test the credibility of a witness. The witness can be asked various things about his past such as the commission of offenses or previous felony convictions. However, most, if not all, of the questions asked here went beyond the fairness of the matter. They were intended to influence the jury and to cause it to hold against Petitioner because of an inference that he was a bad character and because of that he was guilty of this offense. In *Petition of Wright*, 282 F. Supp. 999 (1968), the Federal Court for the Western District of Arkansas held that this type of questioning was improper. The Court held:

> "The Court is convinced that the guaranties set forth in the Fifth and Fourteenth Amendments due process clauses were violated, and petitioner did not receive a fair and impartial trial."

The *Wright* case, *Supra*, has an extensive discussion of this type of situation. The Court cites several cases to sustain its reasoning and those cases should be examined in deciding whether to take jurisdiction of this case.

The *Wright* case has never been followed in the Arkansas State Courts and it was not followed in this case. The Arkansas Courts choose to ignore the decision to the prejudice of defendants in trial even though the case is well reasoned. Petitioner feels that unless this Court

passes on the issue and question presented herein, defendants are going to be continuously harassed in the future by prejudicial questions such as these when they elect to testify in their own behalf. This practice should not be permitted and this Court should stop it if due process and a fair trial are going to mean anything in Arkansas.

CONCLUSION

Petitioner submits that for the above reasons jurisdiction should be noted and the Petition accepted for decision.

Respectfully submitted,

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APPENDIX "A"

JOHN H. PETERS v. STATE OF ARKANSAS

CR-76-159

Opinion delivered July 5, 1977
(In Banc)

Appeal from Sebastian Circuit Court
Fort Smith District

JOHN HOLLAND, Judge; Affirmed

JOHN A. FOGLEMAN, Justice

Appellant was found guilty of obtaining telephone service of more than $35.00 in value from the Lavaca Telephone Company with intent to defraud, by false and fraudulent written and oral pretenses and representations. He asserts the following points for reversal:

I

A. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR A DIRECTED VERDICT.

B. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT OF THE JURY.

II

THE TRIAL COURT ERRED IN ADMITTING IN EVIDENCE, OVER APPELLANT'S OBJECTION, STATE'S EXHIBIT ONE WHICH WAS A PHOTOSTATIC COPY AND NOT THE ORIGINAL OR BEST EVIDENCE OF THE CHECK IN QUESTION WHICH WAS THE ALLEGED BASIS OF THE FALSE PRETENSE.

III

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTIONS AND OBJECTIONS TO EXCLUDE EVIDENCE OF OTHER ALLEGED "HOT" OR OVERDRAFT CHECK OFFENSES.

IV

A. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTIONS AND OBJECTIONS TO EXCLUDE TESTIMONY CONCERNING HIS ALLEGED FAILURE TO APPEAR FOR TRIAL AND THAT HE WAS CHARGED WITH BOND JUMPING ON THIS OFFENSE.

B. THE TRIAL COURT ERRED IN REFUSING TO GIVE A CAUTIONARY INSTRUCTION LIMITING THE PURPOSE OF TESTIMONY CONCERNING APPELLANT'S FAILURE TO APPEAR FOR TRIAL AND THE CHARGE OF BOND JUMPING AT THE TIME THE TESTIMONY WAS ADMITTED EVEN THOUGH REQUESTED TO SO INSTRUCT BY APPELLANT.

V

THE TRIAL COURT ERRED IN PERMITTING IMPROPER CROSS-EXAMINATION OF APPELLANT AND HIS WITNESS, SHIRLEY SELF, UNDER THE GUISE OF PERMITTING THE TESTING OF THEIR CREDITABILITY, WHICH QUESTIONS WERE HIGHLY PREJUDICIAL AND DENIED APPELLANT DUE PROCESS OF LAW AND A FAIR AND IMPARTIAL TRIAL.

VI

A. THE TRIAL COURT ERRED IN REFUSING APPELLANT'S REQUESTED INSTRUCTION NUMBER ONE WHICH INSTRUCTED THE JURY THAT THE

CONSTITUTION PROHIBITS A PERSON FROM BEING IMPRISONED FOR NON-PAYMENT OF A CIVIL DEBT.

B. THE TRIAL COURT ERRED IN REFUSING APPELLANT'S REQUESTED INSTRUCTION NUMBER TWO WHICH INSTRUCTED THE JURY THAT THE FACT APPELLANT OWED FOR TELEPHONE SERVICES WAS NOT SUFFICIENT TO CONVICT OF THE CRIME OF FALSE PRETENSE.

I

Appellant contends that there was no substantial evidence to prove that he committed the offense, and that the verdict of the jury is based on speculation and conjecture. We do not agree, when we view the evidence in the light most favorable to the State.

Appellant says that the State failed to meet its burden of proving three essential elements of the crime, i.e., that the alleged representation was false, that it was made with knowledge of its falsity and that some property or money was obtained on the basis of the representation. In order to consider these questions, it is necessary that we state some of the background.

The Lavaca Telephone Company, owned and managed by Clyde Gibson, had furnished telephone service to C & C Leasing Company, a trucking company headquartered in Lavaca, since it applied for service on January 30, 1974. Appellant John Peters and Bill Womack purchased the company from Michael Casey and Ronald Casey, Vice-President of Citizens Bank of Lavaca, in January, 1974, and paid $75,000 for it from the proceeds of a Small Business Administration Loan of $100,000, for which Ronald Casey

applied and in which the bank participated. Womack withdrew from the business in March, 1974.

The telephone service consisted of two local lines and two in-and-out WATS lines. The monthly telephone bill usually exceeded $1,500. The company did its banking at the Citizens Bank of Lavaca. The business became bankrupt in September, 1974. The building that served as its headquarters burned on September 17, 1974. The business seems to have been underfinanced and in difficulty from the very beginning of its operation by Peters and his partner.

The alleged false representation is based upon a check of C & C Leasing for $3,369.43 dated September 11, 1974, signed by appellant and drawn on the Citizens Bank to the order of Lavaca Telephone. It was given for telephone service. Appellant's contention on the question of falsity is that the check was never represented by him to be good.

The statute prohibited obtaining any service by color of any false token or writing, or by any other written or oral false pretense.[1] Ark. Stat. Ann. §41-1901 (Repl. 1964). The mere drawing and delivery of the check itself is equivalent to a representation that the drawer has funds or credit in the bank on which it is drawn, in the absence of an accompanying explanation as to its validity when presented. *Mortensen v. State,* 214 Ark. 528, 217 S.W. 2d 325. Appellant, however, argues that these facts are only prima facie evidence, which is not supportive of a verdict where it is contradicted by other evidence explaining the transaction, relying on *Edens v. State,* 235 Ark. 284, 357 S.W. 2d 641. But Edens was prosecuted under the overdrafting statute and in the very first paragraph of the opinion the

[1]This offense is currently within that category of offenses defined as theft of services. See Ark. Stat. Ann. §41-2204 (Crim. Code, 1976).

Court pointed out that it was important to keep in mind that the appellant there was not charged with obtaining money by false pretenses under §41-1901. That case is not precedent here. The overdrafting statute itself limits the effect of uttering or delivering a check to prima facie evidence, both of intent to defraud and of knowledge of insufficient funds, which may be deprived of probative force by evidence tending to overcome it. Ark. Stat. Ann. §67-722 (Repl. 1966); *Edens v. State,* supra. Insofar as this question is concerned, the matter resolves itself into a question of fact as to the circumstances, time and place of delivery of the check.

Appellant testified, with some corroboration, that he delivered the check to Clyde Gibson about 4:30 or 5:00 p.m. on September 11, in the presence of his bookkeeper and secretary, Shirley Self, and of Ronald Casey, in appellant's yard after Gibson had inquired and Casey had told appellant to write a check for the amount and that he would hold the check until sufficient funds came into the bank for appellant's account for its payment. He added that he told Gibson the check was not any good. He said that he had previously given Gibson checks for telephone services, telling him that they were not good, and that payment was usually refused on these checks the first time they were presented but those checks cleared after the second or third presentation.

Shirley Self testified that checks in payment of telephone bills for April, May, June and July had been returned. Although Peters testified that Gibson had stopped when, in passing, he had seen him and Casey in the yard talking, Mrs. Self said that when Gibson came by, Peters and Casey were in the company office and walked outside

and talked to Gibson, after which Peters instructed her to write the check that was given to Gibson.

Ronald Casey, a witness for appellant, was Vice-President of the bank when the check was given, but left the bank in September, 1974. He testified that he recalled two or three C & C Leasing Company checks for telephone bills having been returned because of insufficient funds in the company account and that he had, on occasion, made cashier's checks to the telephone company on payment of such checks, when the trucking company had made a deposit. He would neither confirm nor deny his presence when the check of September 11 was delivered to Gibson, but said that he could not remember having been present on the occasion described by Peters. He denied having told anyone that he would hold this particular check, saying that if he did, he couldn't remember having done so. He could not remember telling anyone that he would pay a particular check, but recalled having told others that he would pay a check and having told the telephone company that he would pay other checks. Casey was away from the bank, on vacation, when the check was presented and never returned to the bank. At the time of this alleged delivery of the check, Casey had known for some time that he was leaving on a two week vacation on September 13, but had not known that he would not return to his employment at the bank. He said that he should have remembered making the statement attributed to him, because he would have had to have told someone else about the check, under the circumstances. He said that this would have been necessary because the check probably would not have reached the Citizens Bank for two or three days after it was given. Casey simply remembered nothing at all about this alleged transaction.

Gibson testified that the bill became delinquent on August 20 and that he told Peters on September 10 that service would be discontinued unless it was paid and that Peters told him that he would pay it on the next day. Gibson said that the service was continued and that he refrained from giving Peters the required five day notice of disconnection when the check in question was delivered to the telephone office. He positively denied going to Peters' place of business on September 11.

Mrs. Ann Smith, an employee of the telephone company, testified that a lady, other than Shirley Self, gave the check to her in the telephone office between 9:00 a.m. and 12 noon September 12. She did not know and had never seen this lady before.

The jury obviously resolved the conflict in this testimony against Peters.

Appellant argues that there can be no representation by Peters, because it was not shown that the lady who allegedly brought the check to the telephone company was his agent. We note that Peters had a female secretary other than Mrs. Self at the time. When the circumstances relating to Gibson's threats to discontinue service and Peters' promise to pay, as related by Gibson, are considered, the inference that the delivery was made or authorized by appellant is certainly reasonable.

The falsity of the representation by the making and delivery of the check is obvious. But appellant argues that it was not knowingly made with intent to defraud. As we view the evidence this was a question of fact resolved against appellant upon substantial evidence. It is true that intent to defraud is an essential element of the crime charged and that one who draws a check, knowing that he

has no funds with which to pay it, is not guilty, if he has the honest and reasonable expectation that the check will be paid upon presentation, or if he is unaware of the balance in his account when he draws a check in excess thereof. Appellant argues that he was always unaware of the balance in his bank account, but, in view of his own testimony, it would be preposterous to say that he did not know that the check drawn was in excess of any balance he might have had. Furthermore, it is undisputed that Peters had clearly known that many of the checks he had written on the bank account were dishonored because of insufficient funds.

Intent to defraud may be and usually must be proved by circumstantial evidence. 3 Underhill's Criminal Evidence (5th Ed.) 1799, §788; 35 CJS 914, False Pretense, §52; 32 Am.Jur. 2d 218, False Pretenses, §70. See *Shell v. State*, 184 Ark. 248, 42 S.W. 2d 19. Cf. *Mumphrey v. State*, 251 Ark. 25, 470 S.W. 2d 589. The making of the false representation is a significant circumstance, to say the least. Other significant circumstances are the imminent disconnection of the phone servce; the return of 17 checks drawn by appellant for insufficient funds between September 1 and September 14, 1974, 28 in August, and 33 in July; deposits in July amounted to only $11,413.94, in August, to $3,116.03 and in September, to $2,600.00; and the September beginning balance was overdrawn. There was also evidence from which the jury might have inferred that appellant became a fugitive from justice, a matter we will treat later in this opinion.

Appellant relies upon the fact that the bank had honored several checks when his account was insufficient to cover them, that the account was overdrawn most of the time he was in business, that several checks were

honored on their second presentation after payment had been refused upon the first presentation and his own testimony that he was never aware of his bank balance. Under all the facts and circumstances, the question whether appellant had the honest and reasonable expectation that the check would be paid was for the jury. If his testimony was accepted as credible, there was at least a reasonable doubt about his issuance and delivery of the check without reasonable expectation that it would be paid. But Casey's failure to corroborate appellant's testimony about the circumstances of the delivery and Casey's failure to arrange for honoring of the check, knowing that he would not be in the bank when the check was presented, could reasonably be taken to cast considerable doubt upon appellant's credibility, even if nothing else did. Peters admitted that he had no idea how Casey was going to cover this check. He simply said that the bank was paying some of his checks and returning some.

The circumstantial evidence of fraudulent intent was substantial.

Appellant also argues that the telephone company did not extend any service in reliance upon the check, having relied solely upon the credit of appellant and his ability to pay.[2] This might be the case if nothing except the payment of the *existing* debt depended upon the checks being paid upon presentation. But this is not necessarily the case. Clyde Gibson testified that after he told Peters that the telephone service would be disconnected, unless the account was brought current, he withheld giving a required five day notice of disconnection solely because of receipt of the

[2]This argument is made in spite of appellant's admission that, as a result of his giving the check, his telephone service was continued for three or four days.

check on September 11 and did not give the notice until September 14, when he learned that the check would be returned. This notice called for disconnection on September 19 but the service was not discontinued until the following morning. Even though the trailer which had served as the office of C & C Leasing Company was destroyed by fire on the night of September 17 or the morning of September 18, there was an extension to Peters' apartment which remained intact until September 20. If the notice had been given on September 11, the service could have been discontinued on September 16. The telephone company records indicated that the charge for service rendered after September 11 amounted to $160.39, which was never paid. But appellant says that it is clear that Gibson did not rely upon the check for continued service because he gave notice of disconnection on September 14, and since the check was not dishonored until September 17, there was no possible way this notice could have been related to the check given in payment of a past due debt.

There was, however, substantial evidence that the telephone company had notice before September 17 that the check was invalid. The check was deposited by the company on September 12 in the First National Bank in Ft. Smith, where it had its account. Gibson testified that he did not inquire of the Citizens Bank whether the check was good because the bank had previously refused to give him this information as he was not a customer. However, on September 14 an employee of the telephone company told him about a call from the Federal Reserve Bank advising that the check was being returned. (Mrs. Ann Smith testified that she received the call on September 13.) Notice of disconnection was given immediately. Gibson later learned that the check was presented twice to the

bank at Lavaca. It was lost and never actually returned to him.

James Mitchell Llewellyn, President of Citizens Bank at Lavaca, testified that the check was presented to his bank on September 17 and September 23, but not paid on either occasion and that the account on which it was drawn had been in an overdrawn status since August 19, 1974. Llewellyn surmised that a stamped notation "Previously advised by wire," with a bank routing number thereunder, on the check indicated that the Federal Reserve Bank had advised the First National Bank in Ft. Smith that the check was unpaid. He said that the Little Rock branch of the Federal Reserve Bank was the clearing house for most of the banks in the region and that handling this check would require from three to seven days.

Llewellyn testified that no one could have known the check was not good before it was dishonored unless the First National Bank had called the bank at Lavaca to get that information, and, if the First National Bank had done so, it would still send the check through on the chance that it would be paid. He said that the check could have reached the First National Bank on September 13 and that, while he received no call from the Federal Reserve Bank inquiring about the check, it is possible that the inquiry might have been made of one of seven other employees of his bank and that it was possible, though improbable, that Gibson could have known, on September 14, that the check was going to "bounce". Although he had not, in ten years' time, ever received a call from the Federal Reserve Bank about checks, he had received calls from the First National Bank in Ft. Smith.

The comptroller of the Ft. Smith bank testified that the original check had been lost in the mails and identified a photocopy of it made from microfilm of incoming and outgoing checks made by that bank. He said that the words stamped on the check indicated that the Federal Reserve Bank had called the Ft. Smith bank; that the check was on its way back and that this was normal procedure on checks of $1,000 or more; and that, according to the date the First National Bank received the returned check, his bank would not have notified Gibson until after September 19.

Louis Entress, Assistant Cashier and supervisor of the exchange and collection department of the First National Bank testified that, from his experience, it was likely that, if the Federal Reserve Bank recognized that a check was bad, from the number of other such checks on the same account, it might take extraordinary measures to protect the bank from which the check was received. It is likely that they would notify that bank. He had no way of knowing whether the Federal Reserve Bank had called the telephone company or not, and he did not know of this ever having been done.

Peters testified that Casey would, on occasion, hold checks presented until they cleared, sometimes four or five days, sometimes four or five weeks, or whatever time it took to clear a check, and that Llewellyn would hold checks for payment for him at times, having held some and returned some.

Resolution of the conflicts in the testimony was for the jury. Whatever discrepancies there are, there was a possibility that Gibson received notice on September 14 that the check would not be paid, and that the bank at Lavaca

may have held the check without returning it for some period after first receiving it.

II

Appellant contends that the photocopy of the check was inadmissible because the State did not sufficiently lay a proper foundation for its introduction; because the comptroller of the bank in Ft. Smith, without stating what search or inquiry he had made, simply stated that the original was lost in the mails. However unsatisfactory the foundation may have been for the introduction of secondary evidence, the photocopy was admissible as a photocopy of a business record under Ark. Stat. Ann. §28-932 (Supp. 1975). Appellant also invokes Rule 1003 of the Uniform Rules of Evidence (Act 1143 of 1975) and says that introduction of this copy was unfair because the markings and dates on the back side of the check are illegible and the front could hardly be read. This argument cannot prevail. This issue was not raised in the trial court. The statute adopting the Uniform Rules of Evidence was not effective until after the trial. The witnesses who testified were examined thoroughly about the information which appellant contends would have been disclosed by the original.

III

Appellant made a motion in limine to exclude any evidence relating to overdraft offenses by him as being irrelevant to a charge of false pretenses. He also points to the testimony of Llewellyn about the return of checks on account of insufficient funds as being irrelevant. Apparently, this is the only evidence to which appellant relates this objection. This testimony was certainly relevant to appellant's knowledge of the falsity of his implied representation. It was relevant to the claim that appellant had a

reasonable expectation that this check would be paid in reliance upon past practices of the bank in holding his checks for payment. The mere fact that the crime of overdrafting does not require proof of fraudulent intent for a prima facie case, did not make evidence of appellant's habits and practices in writing checks without sufficient funds inadmissible on the question of motive, design, and criminal intent, to which the evidence was limited by the trial court's instruction.

IV

Appellant's unsuccessful motion in limine to exclude evidence of his failure to appear for trial and his being charged with "bond jumping" was based on the fact that his appearance bond showed the charge as overdrafting rather than false pretense and the contention that notice of trial was sent to an attorney who did not represent him. The objection that the evidence was irrelevant was also urged.

A deputy circuit court clerk testified that appellant was scheduled for a court appearance on this charge on June 9, 1975, but did not appear and his bond was forfeited and a bench warrant issued for him. A notice of jury trial settings, which included this case, was sent to Don Langston, the Public Defender for Sebastian County. The bond recited the charge as "overdraft felony." The sureties were Arthur Jurney Bail Bond Company, Inc. and Ralph Middleton, its manager. The bond called for appearance "at the call of Court." When Middleton was called to the witness stand, appellant's objections were renewed and complaint was made that evidence of other crimes was being admitted without a cautionary instruction and asked that, if his objection was overruled that such an instruction be given.

Appellant's attorney classified evidence of failure to appear, forfeiture of bond and issuance of a bench warrant as evidence of another crime. The court overruled objections to the witness testifying.

When appellant made a request for a cautionary instruction, the trial judge inquired whether request would be made that such an instruction be also given at the conclusion of the evidence, and appellant's attorney, after first refusing to indicate whether it would be, stated that he anticipated asking for the instruction at that time. The judge stated that it would be given at that time and asked whether the attorney was offering a cautionary instruction and received the response that the attorney only showed one to the court and was not offering it at that time. The judge stated that the instruction would be given at the end of the case. It was. There was no abuse of discretion here.

Middleton testified that he received notice of the June 9 setting and tried to reach Peters through an attorney in Muskogee. He said that, on a Thusrady prior to June 9, he had received a call from a person who identified himself as John Peters, and who sounded like John Peters. Middleton told the caller that he must be in Middleton's office at 8:00 a.m. on Monday, June 9 and go to court at Greenwood, to which the caller responded, "Well, I'll be there." He said that when Peters did not appear, he made efforts to locate him in Oklahoma, Arizona, Texas and New Mexico, and that Peters was arrested in Flagstaff, Arizona in October, 1975 and returned to Sebastian County. He testified that when Peters asked him to make another bond, he responded, "We've got a charge against you of bond jumping," and that Peters said that he had been out of state driving on the "north slope" and, although he knew he was supposed to do so, just couldn't make it "here" for court. Appellant's

motion for mistrial at this point was denied. No admonition to the jury was requested. Deputy Sheriff George Fuller testified that he took Peters into custody in Flagstaff, Arizona, on November 2, 1975, and returned him to Ft. Smith.

We note that Peters testified that he had been living in Alaska and driving a truck. He said that he had called Middleton on June 9 and when he was advised that the trial was on June 11, he told Middleton that he would ask his Muskogee attorney to get the trial postponed until July. Peters said that he didn't even know that he was supposed to call Middleton until June 7. He admitted having talked in July with his father, mother and ex-wife, who were in Arkansas, but not having made any inquiry of anyone about the court proceedings. He did not at any time talk to his Muskogee attorney about his success in obtaining a postponement or about the trial date. He said he got no further notification about the trial and thought that if it was important, someone would mail papers to his attorney, "whichever one in town knew at that time." He admitted that he never told anyone he was in Alaska, even though Middleton had asked where he was during their telephone conversation. He said that he felt that his whereabouts was no one's business.

We find no abuse of discretion in the trial court's denial of the motion in limine or in the denial of the motion for mistrial. The effect of any reference by Middleton to a charge of "bond-jumping" could have been eliminated by an admonition to the jury, but none was requested. We find no merit in the argument that the fine distinction between the charges of overdrafting and false pretenses made the evidence inadmissible, because it is obvious that this bond was given for appellant's appearance on this charge.

The evidence as to Peters' failure to appear was relevant on the questions of his intent and his consciousness of guilt. Evidence of flight by an accused and of arrest in a foreign state is always admissible as a corroborative circumstance to be considered on the questions of intent and of consciousness of guilt. *Murphy v. State,* 255 Ark. 90, 498 S.W. 2d 884; *Smith v. State,* 218 Ark. 725, 238 S.W. 2d 649; *Stevens v. State,* 143 Ark. 618, 221 S.W. 186. Flight after a charge has been made may be shown. *Herren v. State,* 169 Ark. 636, 276 S.W. 365; *Stevens v. State,* supra. Flight is but a form of evasion of prosecution and any evasion of prosecution is considered in the same light, for evidentiary purposes, as flight. See *France v. State,* 68 Ark. 529, 60 S.W. 236; *Commonwealth v. Myers,* 131 Pa. Super. 258, 200 A. 143 (1938). Evidence tending to show flight after admission to bail was admissible, and the same rule as to admissibility applies to evidence of flight at any time after the crime is committed. *State v. Neal,* 231 La. 1048, 93 S. 2d 554 (1957); *Commonwealth v. Myers,* supra; *State v. McTague,* 190 Minn. 499, 252 N.W. 446 (1934); 1 Wharton, Criminal Evidence (13th Ed.) 452, §214. The issuance of a bench warrant, alias capias or other such writ indicating forfeiture of bond is admissible. *State v. Walters,* 29 S.W. 2d 89 Mo. (1930); *Tinsley v. State,* 30 Ga. App. 638, 118 S.E. 765 (1923). Evidence of failure to appear when the case is called, of forfeiture of bond and of subsequent arrest is all admissible. *Williams v. State,* 148 Tex. Cr. 437, 187 S.W. 2d 667 (1945). *State v. McTague,* supra; *Williams v. State,* 125 Tex. Cr. 410, 68 S.W. 2d 501 (1934); *Woody v. State,* 37 Ga. App. 338, 140 S.E. 396 (1927); *Tinsley v. State,* supra; 1 Wharton, Criminal Evidence 453, §214. The lapse of time between the crime and the flight goes to the weight to be given to the evidence and not to its

admissibility. See *Davis v. State,* 237 Md. 97, 205 A. 2d 254 (1964), cert. den. 382 U.S. 945, 86 S. Ct. 402, 15 L. Ed. 2d 354; 1 Wharton, Criminal Evidence 455, §214. Evidence of flight after making bail is not inadmissible, when "jumping bail" is a separate crime, because this is a well recognized exception to the rule excluding evidence of other crimes. *State v. Roderick,* 9 Ariz. App. 19, 448 P. 2d 891 (1969); *State v. Neal,* supra. See also, *Fulford v. State,* 221 Ga. 257, 144 S.E. 2d 370 (1965); *Spears v. State,* 91 Tex. Cr. 51, 237 S.W. 270 (1922); *Fallis v. Commonwealth,* 197 Ky. 313, 247 S.W. 22 (1923). Cf. *Commonwealth v. Madeiros,* 255 Mass. 304, 151 N.E. 297, 47 ALR 962 (1926); *Cox v. State,* 25 Okla. Cr. 252, 220 P. 70 (1923). This is consistent with the general rule we have always applied in holding that evidence of other indictable offenses is admissible to prove motive or intent. *Graham v. State,* 224 Ark. 25, 271 S.W. 2d 614.

V

Appellant complains that he and Shirley Self were extensively cross-examined on matters which could have pertained only to his credibility. We have often spoken of the importance of cross-examination and we need not emphasize what we have previously said. At least six of the objections now made were sustained. Several questions about other offenses and other worthless checks were proper on cross-examination. Questions relating or enlarging upon appellant's statements on direct examination were proper. Permitting questions pertaining to specific acts of immorality was not improper. See *May v. State,* 254 Ark. 194, 492 S.W. 888, cert. den. 414 U.S. 1024, 94 S. Ct. 448, 38 L. Ed. 2d 315 (1973); *Holden v. State,* 156 Ark. 521, 247 S. W. 768. Asking Shirley Self about going over the jury list was appropriate as bearing upon her interest or

bias, and there was no abuse of discretion in allowing this inquiry. We find no prejudicial error in the cross-examination of these witnesses.

VI

Appellant requested two instructions stating that the mere fact that Peters owed the telephone company for telephone service was not sufficient to convict him of the crime of false pretense. The only difference in them was that one of them recited the constitutional prohibition against imprisonment for debt. We find no error in the court's refusal of both of these instructions. The court defined the crime with which appellant was charged in statutory language and stated that, in order to find appellant guilty, the jury must find beyond a reasonable doubt that appellant obtained services of a value of more than $35.00 by false pretense, and that if the jury had a reasonable doubt, it should find him not guilty. The court also instructed the jury that it must find appellant guilty of each of the essential elements of the crime, i.e., materiality, falsity and reliance by the person parting with a thing of value, beyond a reasonable doubt. These instructions adequately covered the matter.

The judgment is affirmed.

We agree. Harris, C.J., George Rose Smith and Holt, JJ.

APPENDIX "B"

JOHN H. PETERS v. STATE OF ARKANSAS

CR-76-159

NOTICE OF APPEAL

Comes the Defendant-Appellant, John H. Peters and hereby gives notice of appeal from the decision and opinion delivered on July 5, 1977, by the Arkansas Supreme Court, affirming the Judgment of the Sebastian County Circuit Court, Greenwood District, dated March 11, 1976, and designates the entire Judgment, opinion and decision of the Arkansas Supreme Court as appealed from.

The appeal is taken to the United States Supreme Court under the provisions of 28 U.S.C. §1257.

/s/ Robert S. Blatt

CERTIFICATE OF SERVICE

I, Robert S. Blatt, hereby certify that I have mailed a copy of this Notice of Appeal to Appellee, State of Arkansas, by mailing a copy to its counsel of record, Attorney General of Arkansas, by depositing same in a United States Post Office, with first class postage, prepaid, to this address, Justice Building, Little Rock, Arkansas 72201.

/s/ Robert S. Blatt

Filed on July 19, 1977, in the Arkansas Supreme Court.

APPENDIX "C"

JOHN H. PETERS v. STATE OF ARKANSAS

CR-76-159

NOTICE OF FILING FOR WRIT OF CERTIORARI TO REVIEW

Comes the Appellant-Petitioner, John H. Peters, and hereby gives notice of filing for Writ of Certiorari to review the final decision and opinion delivered on July 5, 1977, by the Arkansas Supreme Court affirming the Judgment of the Sebastian County Circuit Court, dated March 11, 1976, and designates the entire Judgment, Opinion and Decision of the Arkansas Supreme Court to be reviewed by Certiorari.

The review by Certiorari is taken to the United States Supreme Court under the provision of 28 U.S.C. §1257(3).

/s/ Robert S. Blatt

CERTIFICATE OF SERVICE

I, Robert S. Blatt, hereby certify that I have served a copy of the foregoing Notice of Filing for Writ of Certiorari to Review on the Attorney General by mailing a copy of same to Honorable Bill Clinton, Justice Building, Little Rock, Arkansas 72201.

/s/ Robert S. Blatt

Filed on September 22, 1977, in the Arkansas Supreme Court.